

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Thrivest Specialty Funding, LLC

Petitioner,

v.

William E. White,

Respondent.

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Case No. 2:18-cv-1877

Judge Brody

**RESPONDENT'S RESPONSE TO THRIVEST'S BRIEF IN FURTHER SUPPORT OF
ITS EMERGENCY MOTION FOR CONTEMPT AND IN RESPONSE TO THIS
COURT'S ORDER OF AUGUST 16, 2019**

ARGUMENT

On July 1, 2019, this Court stayed this action in favor of arbitration (ECF No.25). On July 9, 2019, Thrivest moved for a finding of contempt for “failure to comply” with the Interim Arbitration Award (ECF No. 26). On July 23, 2019, the Respondent filed a response to the motion (ECF No. 27). On July 24, 2019, Thrivest filed a reply in support of its motion (ECF No. 28). On July 26, 2019, the American Arbitration Association appointed administratively Nancy Lesser as the sole arbitrator.¹

On August 2, 2019, Thrivest first raised issues, with Arbitrator Lesser, regarding compliance with the Interim Arbitration Award as follows:

I write to request that Arbitrator Lesser consider holding the preliminary conference next week, if at all possible. On June 4, 2019, the Emergency Arbitrator in this action entered the attached Interim Award of Emergency Relief, directing Mr. White to escrow \$1.25 million in his attorney's trust account pending resolution of this arbitration on the merits. The Emergency Arbitrator's decision necessarily involved a determination that

¹ A true and accurate copy of this correspondence is attached hereto as Exhibit A.

Thrivest would be irreparably harmed by Mr. White's likely dissipation of the disputed funds absent relief. To date, Mr. White has not complied with the Interim Award. In the absence of compliance with the Interim Award, Thrivest is prejudiced by every passing day and thus my request for an earlier date.²

On August 5, 2019, Thrivest, again, raised issues regarding compliance with the Interim Arbitration Award with Arbitrator Lesser as follows:

Arbitrator Lesser,

As Mr. White's response makes clear, Mr. White has not complied with the Interim Award of Emergency Relief by depositing \$1.25 million (or any funds for that matter) into his attorney's escrow account pending resolution of this dispute on the merits. In his opposition to Thrivest's pending motion for contempt in the District Court, Mr. White asserted that compliance with the Interim Award is "not possible"—an assertion he now repeats here in this arbitration.

Mr. White has not produced any evidence to support this concerning assertion, nor has he responded to Thrivest's request for an accounting of the proceeds of his \$3.5 million award in the NFL Concussion Litigation, which he received in 2018 after Thrivest provided him with a \$500,000 advance against those proceeds in 2016.

Pursuant to AAA Rule 22, and in view of Mr. White's assertion that it is "not possible" for him to escrow the funds ordered by the Emergency Arbitrator as necessary to prevent irreparable harm to Thrivest, Thrivest respectfully requests that you require Mr. White to produce the following in advance of the Preliminary Conference on August 16:

1. A current account statement for all accounts maintained by Mr. White, either individually or jointly, with any financial institution;
2. An accounting of the proceeds of his award in the NFL Concussion Litigation, including documents sufficient to show the current location of such proceeds and any disposition thereof.³

² A true and accurate copy of this correspondence is attached hereto as Exhibit B.

Ms. Lesser, however, declined to order the discovery in advance of the preliminary hearing. On August 16, 2019, during the preliminary hearing, Thrivest, again, raised issues regarding compliance with the Interim Arbitration Award with Arbitrator Lesser which included another request that she order discovery designed to aid in the enforcement of or compliance with the Interim Arbitration Award.

In response, the Respondent indicated that issues regarding compliance with the Interim Arbitration Award had been fully briefed and were pending before this Court. The Respondent asserted further that, in order to avoid possible inconsistent results, the Arbitrator should defer to the Court for disposition. The Arbitrator rejected the Respondent's position and ordered that the requested discovery to be produced within 10 days - on or before August 26, 2019.⁴ Over the Respondent's objections,⁵ the Arbitrator also adopted an expedited briefing schedule ostensibly to assuage or accommodate Thrivest's concerns regarding compliance with the Interim Arbitration Award.⁶

Following a status conference on August 30, 2019, Arbitrator Lesser entered an order which granted Thrivest's motion to compel discovery "in furtherance of the Emergency Arbitrator's Interim Award," and also stated that the Respondent would be subject to sanctions for failure to comply.⁷ On September 10, 2019, Thrivest directed the following correspondence to Arbitrator Lesser:

Arbitrator Lesser,

³ A true and accurate copy of this correspondence is attached hereto as Exhibit C.

⁴ During the preliminary hearing on August 16, 2019, the Respondent requested at least 30 days to respond to discovery.

⁵ During the preliminary hearing on August 16, 2019, the Respondent requested at least 60 days in order to fully brief all of the issues before the Arbitrator.

⁶ A true and accurate copy of the Order dated August 19, 2019 is attached hereto as Exhibit D.

⁷ A true and accurate copy of the Order dated August 30, 2019 is attached hereto as Exhibit E.

The deadline for compliance with the attached August 30, 2019 Order has passed and Mr. White has not complied by producing the required information and documents. Indeed, Mr. White has not produced anything whatsoever. In accordance with the Order, Thrivest seeks sanctions for Mr. White's repeated non-compliance, including but not limited to:

1. Striking all "affirmative defenses" and counterclaims set forth in Mr. White's Answering Statement (May 9, 2019), including that he lacked capacity to enter into the Agreement (paragraph 6), that the Agreement is "unenforceable, void and/or voidable" (paragraph 7), that Thrivest fraudulently induced the Agreement (paragraph 8), that Thrivest defamed him in the press (paragraph 11), among others—all of which should be stricken. This relief is authorized by AAA's Guide for Commercial Arbitrators, available at https://www.adr.org/sites/default/files/document_repository/A%20Guide%20for%20Commercial%20Arbitrators.pdf (**"In some cases, arbitrators have enforced their orders by directing the case administrator to advise a recalcitrant party that failure to obey will result in their claim or counterclaim being stricken."**).⁸ (Emphasis Added).
2. Directing Attorney Wood to turn over all information and documents responsive to the requests in his possession, including the name of Mr. White's financial institution(s) and account number(s), and the last known location(s) of the proceeds of Mr. White's award in the NFL Concussion Litigation and any disposition thereof. Although Mr. White may not have responded to the Order, Attorney Wood may have access to this information through other means. For example, Mr. White likely provided the Claims Administrator with account information in connection with the processing of his award and Attorney Wood may be aware of how Mr. White has used his award since Mr. White received it—such as to pay his legal fees or to the extent that Mr. White has attempted to protect the funds from creditors. This information is not protected by the attorney-client privilege merely because Attorney Wood is holding it.
3. Awarding Thrivest its attorneys' fees and costs in connection with enforcement of the Interim Award of Emergency Relief and such other relief that the arbitrator deems just and proper under the circumstances.

⁸ Thrivest's correspondence of September 10, 2019, is inconsistent with its position that an Arbitrator has no power to coerce compliance with an order.

I am available at the arbitrator's convenience should you wish to discuss this with the parties.⁹

The foregoing chronology of events makes clear that issues regarding compliance with the Interim Arbitration Award are now properly before Arbitrator Lesser for at least four reasons: (1) Thrivest, itself, raised these issues beginning on or about August 2, 2019 after the briefing of its motion for contempt was completed; (2) at the urging of Thrivest, Arbitrator Lesser has issued two orders "in furtherance of the Interim Arbitration Award;" (3) Thrivest has requested and points to the authority of the Arbitrator to award sanctions which are designed to coerce compliance;¹⁰ and (4) it offends notions of judicial economy and is a waste of judicial resources to have this Court consider the same matters presently pending before Arbitrator Lesser.

Respectfully submitted,

/s/ Robert C. Wood
Robert C. Wood (0071861)
WOOD LAW LIMITED
68 North High Street
Building B, Suite 202
New Albany, Ohio 43054
(614) 252-3146 (Telephone)
rwood@rwoodlaw.com

Counsel for the Respondent

Dated: September 10, 2019

⁹ A true and accurate copy of this correspondence and the corresponding Order is attached hereto as Exhibit F.

CERTIFICATE OF SERVICE

I, Robert C. Wood, hereby certify that the foregoing was electronically filed on this date; it is available for viewing and downloading on the Court's CM/ECF system; and it will be served on all counsel of record via the Court's CM/ECF system.

Dated: September 10, 2019

Respectfully submitted,

/s/ Robert C. Wood

Robert C. Wood (0071861)

WOOD LAW LIMITED

68 North High Street

Building B, Suite 202

New Albany, Ohio 43054

(614) 252-3146 (Telephone)

rwood@rwoodlaw.com

Counsel for the Respondent

¹⁰ In its motion for contempt, Thrivest concedes that the contempt power of a district court is designed to be coercive in nature (ECF No.25). Here, it has contemporaneously asked the Arbitrator to make an award of sanctions which is designed to have the same coercive effect.